SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 420

SAMUEL SHEPHERD AND WALTER IRVIN,
Petitioners,

vs.

THE STATE OF FLORIDA,
Respondent

BRIEF FOR PETITIONERS

ALEX AKERMAN, JR.,
FRANKLIN H. WILLIAMS,
THURGOOD MARSHALL,
ROBERT L. CARTER,
Attorneys for Petitioners.

CONSTANCE BAKER MOTLEY,
JACK GREENBERG,
Of Counsel.

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Opinion Below

The opinion of the Supreme Court of Florida is reported in 46 So. 2d 880. This opinion and the order denying petitioner's motion for rehearing appear at pages 400 and 409 of the record.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, section 1257, this being a case involving rights secured under the Fourteenth Amendment to the Constitution of the United States. Petitioners were convicted of rape in the Circuit Court for the Fifth Judicial Circuit in and for Lake County, Florida, and were sentenced to death therefor on September 3, 1949 (R. 47, 48).

The judgment was affirmed by the Supreme Court of the State of Florida on the 16th day of May, 1950 (R. 400-408). Petition for rehearing was denied on the 5th day of July, 1950 (R. 409). Petitioners petition this Court for certiorari on the 30th day of September, 1950, which was granted November 27th, 1950 (R. 409). At each stage of the proceedings herein, petitioners raised and maintained their basic contentions that they were denied rights secured by the Constitution of the United States in that they were tried by a jury selected on the basis of race and color, were denied the adequate assistance of counsel, and were tried in an atmosphere of passion and prejudice, all in contravention of the Fourteenth Amendment to said Constitution. A stay of execution granted by the Supreme Court of Florida is now in effect (R. Original 902).

Statement of the Case

On the 22nd day of July, 1949, petitioners were indicted for the rape of a white woman in Lake County, Florida (R. 5). On August 12, 1949, represented by court-appointed counsel, Harry E. Gaylord, they were arraigned (R. 7) and pleaded not guilty (R. 9). Desiring to be represented by counsel of their own selection, they retained Franklin H. Williams, a member of the Bar of the State of New York, to aid them in seeking and selecting counsel of their choice (R. 380-381). Counsel of their choice was not selected until August 22d, 1949 (R. 382, 378). On August 25, 1949, petitioners' retained counsel, Alex Akerman, Jr., Joseph E. Price, Jr., and Franklin H. Williams, appeared in court as defense counsel (R. 380), court-appointed counsel having retired from the case on August 24th (R. 380). Petitioners' new defense counsel made motions attacking the constitution of the grand jury (R. Original 70) and the petit jury (R. 43) and moved for a continuance (R. 12, 34) and a

change of venue (R. 24, 40), none of which had been done by court-appointed counsel. All these motions were denied (R. 203, 206, 399) and petitioners, preserving their rights therein, went to trial on September 1, 1949. They were convicted and sentenced to death (R. 47, 48). Further proceedings followed, as outlined in the jurisdictional statement above resulting in petitioners bringing this case here praying for a petition for certiorari.

Statement of Facts

On the morning of July 16, 1949, a young white woman reported that she had been raped by four Negroes in Lake County, Florida. Petitioners Shepherd and Irvin, 22 year-old Negro youths, were charged with the crime and arrested in Groveland, Florida, that morning shortly before 7 A. M. and taken to the county jail of Lake County in Tavares, Florida.

When the white community learned of the alleged crime, mob violence erupted in Groveland and adjoining communities. Among the incidents of violence were the killing of a suspect (R. 22), the burning of petitioner Shepherd's home and the homes of other Negroes (R. 90-92, 95, 197), gunfire shot into a Negro cafe (R. 91) and the threat to destroy Sturkeys Still, a Negro settlement west of Groveland (R. 97).

Petitioners Shepherd and Irvin took the stand and attempted to testify that they had been beaten, but objection by the State to the introduction of such testimony was sustained by the trial court (R. 136, 138). The sheriff was accused of intimidating petitioners and threatening to arrest their attorneys (R. 185). He denied this, stating: "I asked them if those nigger lawyers were putting the stuff in their head that they were trying to—the same poison that they were putting in the northern newspapers" (R. 186).

It became immediately necessary to remove petitioners from the county jail to the state prison, the order for their removal stating that there was not time to first communicate with the Governor (R. 6). The Governor called the National Guard from nearby Leesburg, Eustis and Tampa (R. 98, 108, 110-111) and the Guard patrolled the main streets of Groveland and Mascotte, a community about three miles west of Groveland (R. 109). It remained on duty during the grand jury session at which an indictment against petitioners was returned on July 20, 1949 (R. 76), and so remained for approximately a week thereafter (R. 98).

The entire Negro community in Groveland abandoned their homes, farms and businesses and fled to nearby Lakeland, Orlando and Leesburg, Florida (R. 91, 94, 97, 184). One of the petitioners was unable to locate his family and testified that he feared their coming back to testify on his behalf (R. 138).

There was a tremendous amount of newspaper publicity of an inflammatory nature. One of the leading papers, the "Orlando Morning Sentinel," on Tuesday, July 19, 1949, the day before the grand jury returned its indictment, carried on its first page a cartoon consisting of four electric chairs and the caption, "No Compromise—Supreme Penalty" (R. 69). All the local newspapers published similar flaming headlines up until the day of the trial.

Charles Medlin, Business Manager of the Orlando Daily News Corporation, publisher of the "Orlando Evening Star," "Orlando Morning Sentinel" and "Sunday Sentinel Star," three papers which circulate in Lake County, Florida (R. 187, 188), and have the reputation of being leading Florida papers (R. 79, 80), testified that articles, cartoons, editorials and pictures bearing the following headlines

were published in his newspaper from July 17 to August 14, 1949:

"Lake County Bride Kidnapped" (R. 64)
"Troops Ordered to Groveland" (R. 66)
"Mob Violence Flared After Kidnapping" (R. 66)
"Third Kidnapper Captured" (R. 67)
"National Guard Leaves Groveland" (R. 67)
Pictures of National Guard on duty—Box entitled "Demonstration" (R. 67)
"Mob Violence Flares in Lake" (R. 68)
"Negro Houses Burned" (R. 68)
"Men to Defy Officers" (R. 68)
"New Violence in the Groveland Kidnapping" (R. 69)
Cartoon: "No Compromise—Supreme Penalty" Pictures of four electric chairs (R. 69)
"Tense Quiet at Groveland" (R. 70)
"Sheriff Promises to Halt Violence" (R. 70)
Picture: "Night Ridders Burn Lake Negro Homes" (R. 70)
Picture: Police chief showing bullet holes in clothes—result of shooting through door of "honky-tonk" (R. 70)
Editorial: "Cool Heads Needed" with reference to "smart lawyers" (R. 70-71)
"Groveland Under Virtual Martial Law" (R. 73)
"Negro Evacuees Sheltered Here" (R. 73)
Picture: "Flames From Negro Homes Light Night Sky in Lake County" (R. 73)
Picture: "Standing Road Guard at Sturkeys Still on a weapons carrier with a fifty caliber machine gun mounted are Florida National Guardsmen of the 116th Field Artillery Battalion. The Battalion moved in last night heavily armed to prevent further violation following outbreak Monday night. Three Negro homes were burned here Monday night" (R. 74).
"Lake Jury Indicts Trio for Assault" (R. 74)
"March DuBose, first Negro to serve on Lake Grand Jury, accepted without protest" (R. 75)

Picture: "Lake County Grand Jury Probing in the case" (R. 75)
"Groveland Tension Simmers" (R. 75)
"Troops Remain at Groveland" (R. 76)
"McCall Reports All Quiet in Groveland" (R. 77)
"Negro Attack Suspect Killed" (R. 77)
"Negro Killed" (R. 78)
"Trial Scheduled in Attack Case" (R. 79)
"McCall Says Beating Charge Damn Lie" (R. 79)

Managers, editors, and owners of the other papers which circulate in Lake County testified to similar headlines and articles. They were introduced as exhibits by petitioners upon the hearing of the motions for change of venue and continuance (R. 62-135 passim), but the reading of the articles into the record was denied by the court (R. 65).

Newspapermen testified that the sheriff told them that petitioners had confessed and that they published this fact in their newspapers (R. 114-115). The alleged confessions were not introduced in evidence but, as petitioners' court-appointed counsel testified, news of the alleged confessions was widely publicized (R. 221). Witnesses for the state testified that they had read or heard that petitioners had confessed (R. 146, 152, 164). All of the persons called for jury duty testified that they had read of the case in the newspapers or heard it discussed (R. 207-374 passim).

Local defense counsel was not retained until August 22, 1949, the trial having been scheduled originally for August 29, 1949 and subsequently postponed until September 1, 1949. Local counsel could not be retained before this date because of the circumstances surrounding the crime and the violent reaction of the community (R. 381, 382).

The nine day interim between securing of local counsel and the time of the trial was taken up with filing and hearing preliminary motions. A motion to withdraw plea and

set aside arraignment in order that certain pre-arraignment motions might be made was filed, heard and denied on August 25 (R. 377-400). Immediately thereafter, petitioners filed a motion to quash the indictment R. 399). This motion the court refused to consider on the ground that it was filed too late (R. 55). A second motion to withdraw plea, set aside arraignment and to quash was made on August 29 and subsequently denied (R. 58). On the same day, August 29, defense counsel filed motion for change of venue which was heard with the motion for continuance on August 30, 1949. The motion to change venue as well as for continuance was denied on August 31 (R. 203-204). A challenge to the panel was filed before trial on September 1, 1949 and promptly denied (R. 205). Defense counsel then moved again for a continuance upon all of the grounds previously set forth which was denied (R. 206).

In addition to being occupied in the few days preceding trial with motions and hearings on same which continued until late into the night, defense counsel were hindered in securing necessary affidavits because prospective affiants were frightened (R. 383). They were also hindered by the fact that local defense counsel resided in Orlando, Florida, thirty miles from the place of trial and had to commute each day (R. 136). They were further hindered by the fact that Orlando was hit by a hurricane, which blew down a number of trees, just prior to trial (R. 80).

The Clerk of the Court testified that he had been so employed for a period of twenty-one years and that he could not recall ever seeing a Negro on the grand jury during that time (R. 181). The jury by which petitioners were tried was established by a system of racial proportional representation (R. 176, 177).

In an attempt to secure an orderly trial, the trial court adopted and published beforehand the following special

rules and regulations governing attendance and conduct of the public at the trial (R. 10):

> * * * "For all sessions of the Circuit Court of the Fifth Judicial Circuit of the State of Florida, in and for Lake County, to be held during the week beginning August 29, 1949, the following rules will be in force and effect:
>
> "1. Only such number of visitors will be allowed to enter the court room as can be seated by the regular seating accommodations of the court room, and no one will be allowed to stand while Court is in session, except the officers of the Court and those engaged in the trial.
>
> "2. No one will be allowed to stand or loiter in the hallways outside the court room on the third floor of the court house while Court is in session or during the time thirty minutes before Court convenes and thirty minutes after Court recesses or adjourns.
>
> "3. No one will be allowed to stand, sit or loiter on the stair steps of the court house above the second floor.
>
> "4. The elevator will be closed to all except officers of the Court, or individuals to whom the Sheriff may give special permission because of age or physical infirmity, or who may be by him permitted to visit the jail quarters on the fourth floor.
>
> "5. Each person desiring to go to the court room floor will be required to submit to search by the Sheriff or his deputies for weapons.
>
> "6. No person will be permitted to take any valise, satchel, bag, basket, bottle, jar, jug, bucket, package, bundle, or other such item to the third floor of the court house.
>
> "7. All crutches, canes, walking sticks, and other aids to locomotion shall be carefully inspected by the Sheriff or his deputies, and unless necessary for the individual as an aid to walking shall not be allowed above the second floor of the court house.

"8. No demonstration of any nature, handclapping or otherwise, will be permitted at any time while Court is in session.

"9. The Sheriff will permit entry to the court room by the general public by only two doors, at each of which he will place a deputy or bailiff at all times while Court is in session.

"10. No one, other than officers of the Court, jurors, the defendants, members of the bar, witnesses and the press, exclusive of photographers, shall be allowed inside the railing.

"11. No pictures or photographs shall be made, exposed or taken inside the court room, and no one will be allowed to take any photographic or picture making devise inside the court room.

"12. The Sheriff of Lake County, Florida, is charged with the duty of enforcing these rules and to that end he is authorized to employ such number of deputies as may be necessary at the expense of Lake County, Florida, as part of the costs of the trial to be conducted during the time covered by these rules."

Errors Relied Upon

I

The Florida Court was in Error in Holding that the Jury by which Petitioners were Convicted was Constitutionally Established, for the Reason that Said Jury was drawn from a Panel Established by a System of Purposeful Racial Proportional Representation, which this Court has stated to be Unconstitutional.

II

The Florida Court was in Error in Holding that Petitioners Herein had the Adequate Assistance of Counsel, for the Reason that Adequate Time for Counsel's Preparation was denied.

III

The Florida Court was in Error in Holding that Petitioners were not Entitled to the Change of Venue, for the Reason that Passion and Prejudice in the County had made a Fair Trial Impossible.

ARGUMENT

There is no question concerning the propriety of this case in this Court, and none has been advanced. Petitioners raised all the constitutional questions here relied on in the proper manner and at proper times. (Before trial (R. 12, 34; 24, 40; 43), on motion for new trial (R. 45), on appeal (R. 50), on motion for rehearing R. Original 893), on petition for certiorari.)

The rights here violated are of a kind which this Court has always been diligent to protect. Whether federal guarantees of the sort here involved have been violated is a question which this Court has consistently determined itself by independent examination of the record, *Cassell* v. *Texas*, 339 U. S. 282; *Haley* v. *Ohio*, 332 U. S. 596; *Ward* v. *Texas*, 316 U. S. 547; *Malinski* v. *New York*, 324 U. S. 401; *Patton* v. *Mississippi*, 332 U. S. 463.

A

Petitioners Were Denied the Guarantees of the Fourteenth Amendment in that the Jury Was Chosen in Furtherance of an Admitted Policy of Selecting Jurors According to a System of Purposeful Racial Proportionate Representation Which Limited the Numbers of Negroes Serving on Juries Because of Their Race.

It is elementary that the actions of the Board of Commissioners in jury selection were controlled by the Fourteenth Amendment. (Anno: 94 L. ed. 856, 858) (1951)

Therefore, we immediately come to the question upon which this portion of petitioners' case stands or falls:

Can a jury constitutionally convict a Negro defendant if its members are chosen from a panel on which the service of Negroes is limited by a formula which places Negroes thereon in a proportion to whites as the number of Negroes are to the number of whites on the voting list of the county?

The purposeful racial proportional representation questioned above occurred in this case. Although the Florida statutes prescribing the method of selecting jurors[1] do not so provide, the Board of County Commissioners so selected. The testimony of the Chairman of the Board is unequivocal.

> "Question: As chairman of the board of county commissioners, I will ask you if it is the duty of the county commissioners to place the name of jurors in the box?
>
> "Answer: It is.
>
> "Question: Were you present when the regular box was prepared in January, 1941?
>
> "Answer: I was.
>
> "Question: In what proportion were the colored people and the white people put in that box?

[1] 40.01 Qualification and disqualification of jurors. (1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year and in their respective counties for six months; provided however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list. (2) No person who shall have been convicted of bribery, forgery, perjury, or larceny, or any other felony unless restored to civil rights, shall be qualified to serve as a juror. (3) In the selection of jury lists only such persons as the selecting officers know, or have reason to believe are law abiding citizens of approved integrity, good character, sound judgment and intelligence, and who are not physically or mentally infirm, shall be selected for jury duty. . . .

40.02 . . . said commissioners shall personally select, from the lists of male persons who are qualified to serve as jurors under the provisions of § 40.01. . . .

"Answer: In proportion as the colored people were to the total registration in the county.

"Question: You mean the registered colored voters to the registered white voters?

"Answer: Right.

"Question: Is that made fairly and in proportion of those two numbers?

"Answer: It is.

"Question: Was that done in the box in January, 1949?

"Answer: It was.

"Question: Was it also done in the box, the special box that was recently made?

"Answer: It was." (R. 176.)

Upon cross-examination, the same witness testified, in referring to the racial complexion of the jury lists:

"Question. Didn't you put them in in proportion to that?

"Answer: We do, because we know the colored folks and the white folks." (R. 177.)

In its brief in opposition to petitioners' petition for certiorari, respondents admit the racial limitation by proportional representation, but seek to justify it as "the only method that is humanly possible, practicable, and fair to both races; ——." (Brief in opposition, p. 13)

Although petitioners argued the question and submitted the opinion in *Cassell* v. *Texas*, 339 U. S. 282, to the Supreme Court of Florida, it gave no answer thereto merely stating:

"We have examined the authorities relied upon in light of the contention made and it is our conclusion that the evidence adduced fails to establish an unconstitutional, intentional and systematic discrimination by the officials against the Negroes of Lake County in January, 1949, when selecting the names of persons

for jury duty as authorized by the Statute of Florida." *Shepherd* v. *Florida,* 46 So. 2d 880, (1950)

However, an answer to the first part of this question has clearly been given by this Court in the case of *Cassell* v. *Texas*, supra, in which the opinions of Mr. Justice Reed, Mr. Justice Frankfurter and Mr. Justice Clark agreed that a quota system of Jury selection was unconstitutional:

". . . If, notwithstanding this caution by the trial court judges, commissioners should limit proportionally the number of Negroes selected for grand-jury service, such limitation would violate our Constitution. Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.

"We have recently written why proportional representation of races on a jury is not a constitutional requisite. Succinctly stated, our reason was that the Constitution requires only a fair jury selected without regard to race. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible. That conclusion is compelled by the United States Code, title 18, §243, based on §4 of the Civil Rights Act of 1875. While the language of the section directs attention to the right to serve as a juror, its command has long been recognized also to assure rights to an accused. Prohibiting racial disqualification of Negroes for jury service, this congressional enactment under the Fourteenth Amendment, §5, has been consistently sustained and its violation held to deny a proper trial to a Negro accused. Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race." Mr. Justice Reed,

339 U. S. at pp. 286, 287. Concurring, The Chief Justice, Mr. Justice Black and Mr. Justice Clark.

". . . It is not a question of presence on a grand jury nor absence from it. The basis of selection cannot consciously take color into account. Such is the command of the Constitution. Once that restriction upon the State's freedom in devising and administering its jury system is observed, the States are masters in their own household. If it is observed, they cannot be charged with discrimination because of color, no matter what the composition of a grand jury may turn out to be." Concurring opinion by Mr. Justice Frankfurter, 339 U. S. at p. 295. Concurring therein, Mr. Justice Burton and Mr. Justice Minton.

". . . But they are also told quite properly that a token representation of a race on a grand jury is not a constitutional requisite; that in fact it may reach the point of illegality; that representation on the grand jury by race in proportion to population is not permissible for there must be 'neither inclusion nor exclusion because of race.'" Concurring opinion by Mr. Justice Clark, 339 U. S. at pp. 297-298.

The opinions in *Cassell, supra,* were no aberrations—to the contrary they derived from a long series of this Court's opinions which struck down discrimination in jury selection, and soundly accord with their reasoning and holdings.

At the very outset, in *Strauder* v. *West Virginia*, 100 U. S. 303, it was recognized that racial manipulation of the jury panel (in that case total exclusion of Negroes) was:

". . . practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." at p. 308

The Constitution, it was held, protected defendant from trial in such a system of justice.

In subsequent cases, although total exclusion was usually the method of discrimination employed, the Court has made it clear that it is the *discrimination* which is proscribed, not the particular method, no matter how sophisticated. In *Martin* v. *Texas*, 200 U. S. 316, the Court stated at p. 321:

> "What an accused is entitled to demand, under the Constitution of the United States, is that, in organizing the grand jury as well as in the impaneling of the petit jury, there shall be no exclusion of his race, *and no discrimination* (Italics added) against them, because of their race or color. *Virginia* v. *Rives* (Ex parte Virginia), 100 U. S. 313, 323, 25 L. ed. 667, 671; Re Wood, (*Wood* v. *Brush*) 140 U. S. 278, 285, 35 L. ed. 505, 508, 11 Sup. Ct. Rep. 738."

In *Fay* v. *New York*, 332 U. S. 261, it was again recognized that *discrimination* is the prohibited act.

> "Nor is there any such persuasive reason for dealing with purposeful occupational or economic discriminations if they do exist as presumptive constitutional violations, as would be the case with regard to purposeful *discriminations* (italics added) because of race or color. We do not need to find prejudice in these latter exclusions, but cf. *Strauder* v. *West Virginia*, 100 U. S. 303, 306-309, 25 L. ed. 664, 665, 666, for Congress has forbidden them, and a tribunal set up in defiance of its command is an unlawful one whether we think it unfair or not." at p. 292.

Again in *Hill* v. *Texas*, 316 U. S. 400, the Court stated:

> "Where, as in this case, timely objection has laid bare a *discrimination* (italics added) in the selection of grand jurors, the conviction cannot stand because the Constitution prohibits the procedure by which it was obtained." at p. 406.

That racial proportional representation is racial discrimination is a matter of definition. Selection on the basis

of race is merely another way of saying discrimination among persons on the basis of race, as was recognized in *Cassell, supra.*

In addition, petitioners submit that whatever the long term statistical implications, the system employed deprived or reduced the probability of these defendants being tried before a jury composed solely or largely of members of their own race by limiting the number of Negroes on the panel. For example, by this quota system, if the quota of Negro jurors were met before selection of the entire panel, qualified Negroes who might thereafter be chosen would have to be rejected solely on the basis of race. If "relevant judgment" or the "uncontrolled caprices of chance" were employed, racial criteria would be unavailable and a jury would be more likely to contain a majority or be entirely composed of Negroes, although it could also constitutionally contain none.

Opinions of this Court have stated the relevant constitutional criteria for the selection of jurors. Within, but only within these limits, the states may administer their jury systems as they deem best.[2] Generally, these limits exclude undemocratic methods of selection; more specifically, they exclude selection on the basis of race. In *Smith* v. *Texas*, 311 U. S. 128, the opinion of the Court stated:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." at p. 130.

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[2] *Cassell* v. *Texas*, op. cit. *supra*, at p. 295.

In *Glasser v. United States*, 315 U. S. 60, it was stated:

> "But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical, common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government." at p. 85.

Similarly in *Thiel* v. *Southern Pacific Company*, 328 U. S. 217, Mr. Justice Frankfurter, in dissent, stated:

> "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. Since the color of a man's skin is unrelated to his fitness as a juror, Negroes cannot be excluded from jury service because they are Negroes. E. G., *Carter* v. *Texas*, 177 U. S. 442 44 L. ed. 839, 20 S. Ct. 687.
>
> "A group may be excluded for reasons that are relevant not to their fitness but to competing considerations of public interest, as is true of the exclusion of doctors, ministers, lawyers, and the like. *Rawlins* v. *Georgia*, 201 U. S. 638, 50 L. ed. 899, 26 S. Ct. 560, 5 Ann. Cas. 783. But the broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility. See *Smith* v. *Texas*, 311 U. S. 128, 130, 85 L. ed. 84, 86, 61 S. Ct. 164." at p. 227.

In *Fay* v. *New York*, 332 U. S. 261, Mr. Justice Murphy, in dissent, stated:

> "The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community. That means that juries must be chosen without systematic and

> intentional exclusion of any otherwise qualified group of individuals . . . Only in that way can the democratic traditions of the jury system be preserved . . ." at pp. 296-297.

In *Ballard* v. *United States*, 329 U. S. 187, Mr. Justice Frankfurter stated in dissent:

> ". . . This Court decided *Glasser* v. *United States*, 315 U. S. 60, 86 L. ed. 680, 62 S. Ct. 457, which indicated that we deemed it important that a jury be selected on what may be described as a modern democratic basis . . ." at p. 198.

Aside from the specific condemnations of racially selected juries discussed above, racial classifications such as those here employed have been frequently condemned by this Court as odious to our form of government.[3]

This case demonstrates how a racial proportional representation system in combination with a perhaps otherwise permissible criterion, such as the voting list, can completely prevent even the avowed proportional representation, and thoroughly destroy democracy in a jury system.

In addition to all that has been stated above, the pernicious effects of the Lake County jury system were aggravated by the fact that the list from which the panel was selected and from which the racial formula was derived was one on which the proportion of Negroes to whites was very much smaller than the proportion of Negroes to whites in the general population.

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[3] *Hirabayashi* v. *United States*, 320 U. S. 81; *Nixon* v. *Herndon*, 273 U. S. 536; *Steele* v. *L. N. R. R. Co.*, 323 U. S. 192; *Korematsu* v. *United States*, 323 U. S. 214; *Oyama* v. *California*, 332 U. S. 633; *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410. As to the evils of racial quotas generally, see Report of the President's Commission on Higher Education, "Higher Education for American Democracy," Vol. 1 (1947), p. 35; Report of New York State Committee Against Discrimination (1949), p. 30; also Cf. *Hughes* v. *Superior Court*, 339 U. S. 460, 464.

In Lake County, the venue of the instant case, according to census figures, there is a total population over twenty-one years of age of approximately thirteen thousand five hundred (13,500). Of this number, Negroes constitute approximately one-third or four thousand five hundred (4,500). That the number of Negroes possessing the general qualifications for jury service is in the same proportion as white persons is the only fair conclusion to be drawn from the testimony of the state's witnesses at the hearing concerning the character, reputation and status of Negroes in that county (R. 126, 133, 134, 135, 147, 149, 155, 161, 163, 172, 183, 192).

In spite of this general knowledge of the presence of such a large body of Negroes within a county who met the statutory qualifications for jury service, at least one-third (⅓) of the qualified persons, the chairman of the Board of County Commissioners testified that the jury lists were made up "from the registered voters in the county" (R. 176). He knew, or should have known, that when this arbitrary additional qualification of "registration" is applied to potential jurors, the proportion of available Negroes then diminished to about one-sixteenth (1/16) (R. 175). When this fact is considered along with evidence of the long and continued absence of any Negro from a grand or petit jury in Lake County, its purpose and design become evident and its obvious discriminatory intent plain.

Petitioners believe that they have made it clear that a jury constituted by a system of racial proportional representation is unconstitutional *per se*. However, they desire to point out that there are endless possibilities of racial manipulation when such a system is employed.

B

Petitioners, in Being Denied a Continuance, Were Denied the Adequate Assistance of Counsel, Contrary to Powell v. Alabama, 287 U. S. 45.

Respondents concede that the law requires that an accused is entitled to a reasonable time to advise with counsel and prepare his defense.[4] (Brief in Opposition, 18). They merely dispute that such time was not available. The record discloses that counsel of petitioners' choice were finally engaged ten days before the trial date (R. 378). Counsel satisfactory to petitioners could not be engaged prior to this time because of widespread prejudice against petitioners even though many members of the bar were approached and asked to serve (R. 81, 382).

As respondent states, from August 12th to August 22nd, petitioners were represented by Harry E. Gaylord, a court-appointed attorney. That Gaylord's replacement was well warranted is evidenced by the fact that he forewent the opportunity to object to the grand jury upon which no Negro had served prior to this case, and at which time one Negro was present thereon, facts which raised the gravest constitutional questions, and which a conscientious defense attorney was duty-bound to protest.

Gaylord did not object to the composition of the petit jury panel, though this was obviously unconstitutional nor did he move for a change of venue. Petitioners do not submit that adequate defense counsel must be omniscient, but he at least owes his client the duty of presenting such grave questions, or some of them to the court. Gaylord did nothing. The National Association for the Advancement of Colored People did not request Mr. Gaylord to act

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[4] *Powell v. Alabama*, 287 U. S. 45; *Avery v. Alabama*, 308 U. S. 444.

as defense counsel, as respondents assert (Brief in Opposition, p. 14). The record shows that Franklin Williams in seeking defense counsel merely made inquiries concerning Gaylord's disposition towards acting as retained counsel (R. 384). What motivated the National Association for the Advancement of Colored People to consider Gaylord is here irrelevant in view of what he actually did. However, it may be suggested that in desperation the Association was forced to consider him, and did so in the hope that he might be more satisfactory if he worked in conjunction with its attorneys (should petitioners also desire them as counsel), who were not members of the Bar of the State of Florida. That he turned over the fruits of his prior work to retained defense counsel, as respondents assume (Brief in Opposition, p. 15), is nowhere indicated. In fact, the record points in a contrary direction. The relevant testimony of Alex Akerman, Jr., is as follows:

> "I did not desire to act as defense counsel in this cause, and would only do so in the event it became apparent that no other attorney in the State would represent said defendants, and would exhaust every legal remedy available under the law for their defense. I have not since my employment had the opportunity to inquire into the summoning, empaneling and qualification or disqualification of the grand jury by which this indictment was returned. If I am to properly represent these defendants I consider it my duty to make a complete and thorough investigation into all of the matters and thus discharge my duty without having to file hasty and dilatory motions which may or may not be proven. That is all." (R. 378.)

It may here be noted that as of August 25th, Mr. Akerman had not even been furnished with a copy of the indictment (R. 400). If one chooses to index Mr. Gaylord's adequacy by the opinion of others, it may be noted that Mr.

Gaylord's representation was so unsatisfactory to petitioners that they had Mr. Williams spend approximately two weeks in an effort to secure satisfactory counsel.

This short period of time for the preparation of the case was further curtailed by a hurricane which struck Central Florida (R. 80). Portions of the remaining days were spent in argument and preparation therefor, and extended hearings on motions for continuance, for change of venue and a motion to quash the petit jury venire, none of which had been done by court-appointed counsel. "The time between August 24th and 29th, 1949, was largely consumed in the presentations to the trial court of the evidence in support of the motions . . ." (*Shepherd* v. *Florida*, op. cit., *supra*). The inaccessibility of petitioners to their counsel during this period, and a sixty (60) mile roundtrip daily journey to court for counsel (R. 136), in addition to one night session hearing on a motion (over petitioners' protest) further whittled away the little time available for preparation. The testimony prior to this evening session indicates the uncompromising dispatch with which the prosecution proceeded.

> "Mr. Akerman: No further questions.
>
> "That's all the newspapers we have. We have subpoenas out for others, but they are not here.
>
> "Mr. Hunter: You have some other witnesses that are here?
>
> "Mr. Akerman: Yes. I have seen them.
>
> "The Court: Let's proceed with what we have got for a while longer.
>
> "Mr. Akerman: If the Court please, I understood you to say we would adjourn.
>
> "The Court: I meant you would continue with the newspapers and see what we are going to do.
>
> "Mr. Akerman: Will you give me about a three minute recess, then?
>
> "The Court: Yes sir. Give you 5 minutes.

"Mr. Akerman: If the Court please, at this time, it is 5:45 P.M. The defendants respectfully move for a recess upon the following grounds:

"1. That defense counsel are in Orlando, Florida, a distance of some 30 miles from the courtroom, and must drive back and forth every day, consuming a considerable portion of their time.

"2. The defense counsel are working night and day in the preparation of their defense in this case and have made arrangements to have witnesses brought in to discuss with them this case, tonight, in additional attempt on their part to prepare the law.

"3. That it is the usual custom to adjourn the Court at a reasonable house (sic) and that the next witness to be called will, in all probability, take at least an hour and a half.

"Mr. Hunter: Your Honor, the State would like to see this case go ahead. We have got a great many witnesses here, summoned by the State. Just waiting on these men, here while they introduce and read newspaper articles, and we don't want to keep them away from their businesses other extra days.

"The Court: Proceed with the next witness." (R. 140.)

The few days remaining had to be utilized in preparing a defense against a charge traditionally difficult to defend in a community where the contacting and interviewing of witnesses was complicated by the intimidation of mob violence and by widespread antagonism against petitioners in the community (R. 383). Additional handicap inhered in the fact that petitioners' counsel were from New York City and Orlando, both distant from the place of the crime and the trial. Petitioners do not rely on any one of these facts, but submit that in combination they represented terrible obstacles to a defense attorney conscientiously attempting to represent his clients.

Respondent's brief in opposition to the petition for certiorari dwells on the fact that petitioners were represented by two attorneys in addition to Mr. Akerman. An examination of the record reveals that the motions and the hearings thereon were so time and labor consuming that they occupied about three times as much space in the record as the entire trial. In addition, it must be realized that one of those attorneys was from out of the state, and that there were three defendants to defend, the defense of each of whom involved entirely different sets of facts requiring analysis and investigation.

The extent to which petitioners' presentation at the trial was damaged by the refusal to continue, cannot be calculated. It is impossible to establish what a witness would say, if time to conduct an investigation to discover that witness is denied. Suffice to say, that in his verified amendment to the motion for continuance on August 29th, Attorney Akerman stated:

> "That since the filing of the original Motion for Continuance your defendants have been advised of many purported facts, which, if introduced as evidence in the trial, would prove their innocence, but that in order to present said facts, a considerable time will be necessary for investigation and for the obtaining of witnesses to be brought into Court and to present said facts, that it will be impossible to thoroughly investigate such matters and obtain said witnesses at the time for their trial." (R. 35.)

Nevertheless the trial commenced on September 1st.

Under such circumstances, no attorney could prepare an adequate defense within the time allotted. Any competent attorney was duty bound to request a continuance, which would furnish the time necessary to prepare a case in-

volving life and death, with the adequacy which the due process clause of the United States Constitution requires. The right to counsel is not a mere form. It embodies the right to the assistance which counsel can furnish after preparation. It is denied if adequate time to prepare a case is not available as was the case here.

In *Powell* v. *Alabama* (op. cit., *supra*), the Court held:

> ". . . Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob." (at p. 59)

No valid justification has been offered for proceeding over the objections of petitioners' counsel. A possible reason may be found in the testimony of Mrs. Mabel Reese and in similar testimony: Editor and owner of three newspapers which circulate in Lake County, she testified that the State's attorney, Hunter, stated to her that the trial would be held as speedily as possible in order to end mass demonstrations in Groveland (R. 102).

C

The Denial of Petitioners' Motions for Change of Venue and the Denial of Their Motion for a Continuance Violated the Due Process Clause of the Fourteenth Amendment in That Petitioners Were Compelled to Undergo a Trial Dominated by Passion and Prejudice Contrary to the Rule of Moore v. Dempsey, 261 U. S. 86.

The rationale of *Moore* v. *Dempsey*, 261 U. S. 86, which requires that a defendant be afforded a trial free from mob domination can usually be satisfied in only one of two ways, should such an atmosphere exist where and when the trial is scheduled. Either the time or the place of trial must be changed. When the record discloses that Negroes' homes were burned (R. 90-92, 95, 197), Negroes evacuated from the community (R. 91, 94, 97, 154), a Negro shot and killed (R. 22), that armed mobs became a menace too great for normal law enforcement and that the National Guard was called to keep law and order (R. 98, 108, 110-111); that newspapers printed inflammatory stories, cartoons and editorials (R. 64-79 *passim*); then passion and prejudice have reached a stage from which they should be permitted to subside by the passage of time before holding a trial for the crime which precipitated the outbreaks, in the area where they occurred.

Respondents, in their brief in opposition, attempt to establish that the violence and attendant passion were isolated from the trial by space and by time. They assert that all the violence occurred within an area about five miles square (Brief in Opposition, p. 18) and state that "by the time of the arraignment on August 12th, the whole of Lake County was so quiet and peaceable that the petitioners remained there until the trial on September 1st; without the slightest untoward incident being revealed by the record." (*ibid.*, 21) These claims of geographical in-

sulation are refuted by the fact that almost all of the population centers of Lake County are within thirty miles of the Groveland-Mascotte area (Map, U. S. Department of Interior Geological Survey of State of Florida), a negligible distance in that type of country. In addition, the inflammatory newspaper publicity reached into every corner of the County and beyond, being read by every member of the panel (R. 207-375 *passim*).

This prejudicial atmosphere had not subsided by the time of trial. The fact that defendants could be safely imprisoned within the County is the slightest evidence of a healthy attitude. Witness the court's special order compelling the search of persons and property entering the courtroom (R. 10), continuous newspaper publicity (R. 64-79 *passim*), and such comments as: "It might be a good idea to keep on walking" (R. 154). This Court has recognized that violence is not so easily replaced by calm. See *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, in which the court stated:

> ". . . In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful . . ."

In *Moore* v. *Dempsey*, (op. cit. *supra*) the Court held the proceedings so infected community and mob anti-Negro prejudice, that they were termed a "mask." Mr. Justice Holmes wrote for the Court:

> ". . . But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the state courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights." (at p. 91)

Under the conditions described in point "B" of the Argument above, when the motion for continuance was denied, the motion for change of venue offered the only method by which petitioners could have been tried free from the prejudice of Lake County of that time.

After the refusal of a continuance, the denial of a change of venue for these petitioners in that community at that time was a denial of due process in itself.

It may here be noted that the Supreme Court of Florida attempts to explain away the violence by stating that "The inflamed public sentiment was against the crime . . . rather than defendants' race," (*Shepherd* v. *Florida*, op. cit. supra at p. 883) but nowhere explains why such sentiment manifested itself against members of petitioners' race rather than against the crime.

This Court in determining whether a given procedure satisfies the due process clause has found it appropriate to inquire into English common law. Goebel, Constitutional History and Constitutional Law, 38 CLR 555; *Murray* v. *Hoboken*, 18 Howard 272, 276 (1856); *Hurtado* v. *California*, 110 U. S. 516 (1883); *Ownbey* v. *Morgan*, 256 U. S. 94 (1921); *Powell* v. *Alabama*, supra; *United States* v. *Wood*, 299 U. S. 123, 134 (1936); *Green* v. *Briggs*, 1 Curtis 311, 335 (C. C. 1852); *Vanhorne* v. *Dorrance*, 2 Dall. 304 (1795); Dowling, Cases on American Constitutional Law (1937) 632. The common law is clear. In cases both civil and criminal, at the behest of either plaintiff or defendant, when it appeared that a fair trial could not be had because of prejudice in the community, the trial was removed to another county.

In Tidd's Practice (Ninth Edition 1820) at p. 605, the author states:

> "When a fair and impartial trial cannot be had in the county where the venue is laid the courts on affidavit of the circumstances will change it . . ."

Similarly, in I Bacons Abridgment (T. & J. W. Johnson & Co. Edition 1860-76) at page 83, it is stated:

> ". . . They will move it into some other county, when it appears from the circumstances laid before them, that there is a probable ground to apprehend that a fair, impartial, or at least a satisfactory trial cannot be had where it is laid . . ."

In case after case this was done usually by writ of certiorari or by motion to enter a suggestion on the roll: *The King* v. *Harris, Alderman of Gloucester, et al.*, S.C. 3 Burr. 1330; 1 Black W. 379; 96 E.R. 213 (1762); *Mylock* v. *Saladine*, S.C. 3 Burr. 1564; 1 Black W. 481; 96 E.R. 278; *R.* v. *Burnaby*, (1723) 8 Mod. Rep. 146; 88 E.R. 110; *R.* v. *Lewis* (1726) Sess. Cas. K.B. 90; 2 Stra. 704; 93 E.R. 91; *The King* v. *Fawle*, 2 Ld. Raym. 1452; 92 E.R. 445 (1726); *R.* v. *Orme and Nutt*, 1 Ld. Raym. 486, 91 E.R. 1224. In *Mylock* v. *Saladine*, supra, Lord Mansfield set forth the common law practice and detailed some of the reasons therefor:

> "I have no doubt of the propriety of changing the venue, where an indifferent trial cannot be had, nor of the power of this Court to change it when such a case appears. A juror should be as white paper, and know neither plaintiff nor defendant, but judge of the issue merely as an abstract proposition upon the evidence produced before him. He should be superior even to a suspicion of partiality . . . . If the prejudice be general, though not universal, it is sufficient to warrant this rule. It is impossible for the defendant to come at particular facts, so as to form a case for a legal challenge. Here is no universal accusation of the citizens of Chester; only a well-grounded apprehension of danger arising from the general prejudice."

The common law right is also referred to in the leading New York case of *People* v. *MacLaughlin*, 150 N. Y. 365, 376 (1896).

[illegible] has imbedded itself into American [illegible] not by statute as common law, but by widespread [illegible] to [illegible] a firm principle of Anglo-American [illegible] and its [illegible] by state law or the interpretation of state law by state courts violates the due process clause of the Federal Constitution.

Although any of these errors listed above requires a reversal, their multiplication certainly calls for a new trial at which petitioners can obtain the protection of due process.

When defendants are tried before an unconstitutionally constituted jury at a time when counsel has not adequately prepared their defense, in a community inflamed by passion, then the trial is, in the words of Mr. Justice Holmes, "a mask." The outcome, under such circumstances, is inevitable.

Conclusion

Wherefore, it is respectfully submitted that the judgment of the Court below should be reversed.

ALEX. AKERMAN, JR.,
FRANKLIN H. WILLIAMS,
THURGOOD MARSHALL,
ROBERT L. CARTER,
Attorneys for Petitioners.

CONSTANCE BAKER MOTLEY,
JACK GREENBERG,
Of Counsel.

Dated, February 12, 1951.

[1] See as small sample, 15 Code Ala. (1940) § 287; 41 Ariz. Code Anno. (1939) § 1206; Penal Code of California (1949) § 1033; III Gen. Stat. Conn. (1949 Revision) § 8701; Fla. Stat. Ann. (1943) § 52.02; 2 Ga. Code Ann. (1948) § 4906.